

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60497

FILE: B-184412

DATE: February 10, 1976

MATTER OF: Electronic Associates, Inc.

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DIGEST:

1. While termination of contract for convenience of Government is matter of administrative discretion not reviewable by GAO, review of procedures leading to award of contract is within GAO jurisdiction.
2. Since bid of small business bidder in excess of \$10,000 should not have been rejected for failing to furnish employee resumes for use in determining bidder's responsibility and without preaward survey, it was appropriate and not abuse of discretion or bad faith for contracting agency to terminate for convenience maintenance contract awarded to another bidder notwithstanding it may have been performing satisfactorily for six months.
3. Contracting agency should provide contractors to be terminated for convenience of Government because of protests against awards opportunities to comment on protests in accordance with ASPR § 2-407.8(a)(3)(1975).

On December 5, 1975, a protest was received from Electronic Associates, Inc. (Electronic), against the Department of the Air Force's announced intention to terminate Electronic's contract No. F04700-75-C-0341 (for resident maintenance services at Edwards Air Force Base, California) for the convenience of the Government. The Department has advised that this termination was effective December 31, 1975.

The Department terminated Electronic's contract (which was awarded under invitation for bids (IFB) No. F04700-75-B-0102) after it decided that Raycomm Industries, Inc. (Raycomm), rather than Electronic, should have been awarded the contract in question. The Department made this decision during the pendency of a protest which was filed at our Office by Raycomm on July 8, 1975.

Raycomm asserted that its low bid under the IFB should not have been rejected by the contracting officer for failure to contain resumes for two of the four men to be employed for the work. (The IFB stipulated that a bidder's failure to submit personnel resumes might result "in declaring bidder nonresponsive.")

Upon review of Raycomm's protest, the Air Force agreed that Raycomm's bid should not have been rejected. The Department so advised our Office by letter dated November 3, 1975, which contained the following analysis:

"g. Contracting officer determined in the absence of additional information from Raycomm that they were non-responsible and non-responsive, and the contract was awarded to Electronic Associates, Inc., at 1630 hours (Western) or 1930 hours (Eastern) on 30 June 1975.

"h. Additional resumes submitted by Raycomm by message at 2102 hours (Eastern) or 1802 hours (Western) on 30 June 1975.

"i. Resumes submitted by Raycomm delivered to the contracting officer at 0730 hours (Western) on 1 July 1975.

* * * * *

"a. The resumes were required for use in determining whether the contractor met the minimum personnel qualifications of the IFB (paragraph 45, Part I - Section C). Thus, they were obtained for use in evaluating capacity to perform. The decisions of the Comptroller General of the United States, e.g., 42 Comp. Gen. 464, seem to consistently hold that a bidder's capacity or responsibility may be determined on the basis of information submitted after bid opening. The Comptroller General indicates in the case mentioned above that questions as to the capacity or responsibility of a small business bidder may not be treated as questions of responsiveness of his bid because of a statement to that effect in the bid invitation. The case further indicates that this rule is equally applicable to all bidders. Thus, a determination of non-responsiveness based upon a failure to submit resumes obtained for use in evaluating capacity does not appear appropriate.

* * * * *

"e. A review of the sequence of events set forth in paragraph 1 above, indicates that Raycomm was notified they would be awarded a contract at 1125 hours (Eastern) on Friday, required to provide resumes and advised they 'could' be declared non-responsible and non-responsive at 1745 hours (Eastern) on the following Monday, and declared non-responsible and non-responsive at 1930 hours (Eastern) on the same day. In addition a review of the file reveals the following:

"1) The IFB (paragraph 45, Part I - Section C) only requires the submission of resumes with the bid. There is no requirement for the submission of resumes if personnel are replaced.

"2) The IFB (paragraph 8, Part II - Section J) merely requires that replacement personnel conform to the minimum qualifications discussed in subparagraph d above, and be integrated without interruption.

"3) Two men of Raycomm's staff of four would be at Edwards AFB on 30 June 1975. Resumes showing that they met the minimum qualifications discussed in subparagraph d above, evidently had been received and accepted. There is no indication in the file that the two men whose resumes had been accepted could not satisfactorily perform under the contract until other qualified personnel arrived.

"4) The message mentioned in paragraph 1.h above, advises that four individuals will be available at 2400 hours on 30 June 1975 for assignment to contract and provides resumes."

Moreover, the Air Force determined that ASPR § 1-705.4(c)(1974 ed.) requiring a preaward survey to be made prior to a determination by a contracting officer that a small business concern is not responsible because of lack of capacity or credit on a proposed award of more than \$10,000 had not been followed with respect to Raycomm. In view of the foregoing, the Air Force concluded that the Raycomm protest was valid and that an award would be made to Raycomm if determined responsible.

Under the circumstances, in accordance with our regular practice, we advised Raycomm that we considered the protest to be moot and that we were therefore closing the file.

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With respect to the protest against the termination of the Electronic contract, in Service Industries, Inc., et al., B-183535, November 25, 1975, 55 Comp. Gen. _____, 75-2 CPD 345, it was stated:

"* * *, it is generally recognized that '* * * the determination whether a contract should be terminated for the convenience of the Government is a matter of administrative decision which does not rest with our Office.' 47 Comp. Gen. 1, 3 (1967); E. Walters & Company, Inc., Dynamit Nobel A G, Nico Pyrotechnik K G, B-180381, May 3, 1974, 74-1 CPD 226. Therefore, we do not believe it would be appropriate for us to review the validity of the termination per se. However, it is appropriate for our Office to review the validity of the procedures leading to the award of the contract to Merchants /terminated contractor/.

* * * * *

"In this connection, however, we note that the Court of Claims held in National Factors, Inc., and The Douglas Corporation v. United States, No. 93-63, March 20, 1974, that 'The termination of a contract for the convenience of the government is valid only in the absence of bad faith or a clear abuse of discretion.' See E. Walters and Company, Incorporated, B-180381, June 20, 1974. 74-1 CPD 337. * * *" See also B-175421, October 19, 1972.

We believe that the Air Force properly concluded that the Raycomm bid was improperly rejected. Therefore, it was appropriate and not an abuse of discretion or bad faith for the Air Force to terminate for convenience the Electronic maintenance contract-- notwithstanding Electronic may have been performing satisfactorily for six months.

Accordingly, the protest is denied.

Nevertheless, we are bringing to the Department's attention Electronic's assertion that it was not given an opportunity to comment on Raycomm's protest before the Department sustained the

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protest, and we are recommending that the Department take action to insure that interested parties are given the opportunity to comment in similar situations in the future in accordance with ASPR § 2-407.8(a)(3)(1975).


Deputy Comptroller General
of the United States